

Respondent raises two issues on appeal. First, respondent contends benefits should be suspended because claimant, who is incarcerated in a prison facility in Cameron, Missouri, failed to attend a medical appointment scheduled by respondent. Respondent also argues benefits should be denied because claimant has presented no evidence regarding claimant's average weekly wage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be remanded. On remand, claimant should be given an opportunity to present evidence of average weekly wage and respondent should be given an opportunity to have claimant examined at the prison facility in Cameron, Missouri.

Findings of Fact

1. Claimant suffered a compensable low back injury at work on November 2, 1996, and filed an application before the Director on November 14, 1996. Respondent provided medical treatment with Dr. Jeffrey MacMillan and paid what was described at the regular hearing as temporary total disability benefits. Respondent later advised these were temporary partial disability benefits.
2. During the pendency of these proceedings, claimant was convicted of or plead guilty to crimes, including murder, and was sentenced to two life terms. On June 12, 1998, while claimant was in the Jackson County Jail, Dr. Daniel D. Zimmerman evaluated claimant's injury at the request of claimant's counsel. Dr. Zimmerman later testified that in his opinion claimant has an 8 percent impairment to the whole person as a result of his compensable injury.
3. In November 1998, claimant was transferred to the correctional facility in Cameron, Missouri. Respondent then scheduled an examination of claimant with Dr. Michael J. Poppa for December 29, 1998. The examination was scheduled at Dr. Poppa's office. Dr. Poppa stated he would not go to the Cameron facility for the examination. Counsel advised that correctional authorities would not allow claimant to attend the examination at Dr. Poppa's office.
4. On December 30, 1998, after claimant failed to appear for the examination, respondent moved for an order suspending the proceedings until such time as claimant made himself available for examination. The ALJ did not, at that time, suspend the proceedings. Instead, as part of the Award, the ALJ ruled that benefits should be suspended as of the date claimant failed to appear for the examination by Dr. Poppa. The ALJ further held, however, that since all benefits were payable before the date of that scheduled examination, the suspension did not change the benefits respondent owed claimant.
5. Claimant did not introduce evidence of claimant's average weekly wage.

Conclusions of Law

1. Claimant has the burden of proving his right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 1999 Supp. 44-501(a).

2. The Board concludes claimant's failure to appear at the appointment scheduled with Dr. Poppa should not operate to suspend claimant's right to benefits. The relevant statutes are K.S.A. 44-515 and K.S.A. 44-518. K.S.A. 44-515 requires a claimant to submit to examination at a "reasonable time and place." K.S.A. 44-518 provides that if the claimant "refuses" to submit to examination, the employee's right to payment is suspended until the claimant submits and the examination is completed. Respondent argues claimant has refused to submit to examination at a reasonable time and place. Claimant has, according to respondent, by his conduct placed himself in a position where he cannot attend the examination and this should be treated as a refusal. Claimant argues that his failure to appear should not be considered a refusal because he had no choice at the time.

The Board finds no Kansas appellate court decision on point. We do find decisions from other states. Delaware and Nevada have both held failure of an incarcerated claimant to appear for medical examination should not be treated as a refusal because claimant has not willfully or intentionally failed to appear.¹ Pennsylvania, on the other hand, has held that the claimant has no right to force the respondent to make special arrangements to accommodate incarceration.²

The Board concludes that under the circumstances of this case, claimant did not refuse to submit to an examination and a reasonable time and place would have been the correctional facility in Cameron, Missouri. The term "refusal" carries with it an element of willfulness or intent. Claimant did not decide not to go to the examination, he could not go. We are unwilling to have the prior criminal act substitute as the act of refusing to attend the examination.

Under the circumstances, the prison facility in Cameron, Missouri, would have been the reasonable place for the examination. The record indicates respondent asked one physician to go to the facility. When he refused, respondent made no further effort to arrange for an examination.

3. Claimant offered no evidence of his average weekly wage. At the beginning of the regular hearing, the ALJ stated that wage had been discussed at the prehearing conference but no agreement reached. The ALJ also stated what had been alleged:

¹ *Foraker v. NVF Company*, 358 A.2d 730 (Del. Super. 1976); *State Industrial Insurance System v. Campbell*, 108 Nev. 1100, 844 P.2d 795 (Nev. 1992)

² *Raymond v. Workers Compensation Appeals Board*, 659 A.2d 657 (Pa. Cmwlth. 1995)

There was no agreement, however, about average weekly wage although it was alleged that Mr. Neal's wages were \$11.30 an hour plus overtime and a suggestion of \$440 for the wage was made, but not agreed to. He was, however, paid about three weeks of temporary total disability totalling \$983.12 and was not claiming any adjustable or any additional weekly benefits

Claimant did not testify to the amount of his wage and did not otherwise offer evidence of the wage.

K.A.R. 51-3-8(c), a regulation relating to pretrial procedures and stipulations, states that a respondent must be prepared to admit all facts the respondent cannot justifiably deny and must have payroll records available in a form to answer questions that might arise about the wage. Respondent did not offer payroll records or give any indication at that hearing that it had records available as required.

4. The Board has concluded that, in the interest of justice, this case should be remanded for further proceedings. The respondent did not comply with K.A.R. 51-3-8(c) because it did not provide payroll records. We believe that in some cases it would be reasonable to rely on claimant's allegation regarding wage where respondent fails to provide records. In this case, however, it is not entirely clear what the allegations were. At the beginning of the regular hearing, the ALJ simply says there has been a "suggestion" of \$440 per week. But he also says it was alleged the wage was \$11.30 per hour plus overtime. This would not match the \$440 if claimant worked a 40-hour work week as a full-time employee. Claimant's submission letter says claimant alleges \$11.30 per hour plus overtime for a wage of \$440 but, again, the letter does not explain how \$11.30 per hour plus overtime yields the \$440. In short, the record does not clearly establish what claimant is alleging.

The Board also concludes that statements by counsel regarding what temporary total disability benefits have been paid are not a statement about the amount of the wage. In this case, the statement at the regular hearing was only that the payments were for approximately three weeks. Counsel later advised this was temporary partial, not temporary total, disability benefits. But even if the statement were more specific, the statement was not a stipulation as to the average weekly wage.

For these reasons, the Board concludes the case should be remanded and claimant allowed a reasonable time to introduce evidence of the average weekly wage.

Because the case is to be remanded for other reasons, the Board also concludes respondent should be allowed time to schedule an examination at the prison facility if they wish to do so. As above indicated, the Board does not consider claimant's conduct to be a refusal that would warrant suspension of benefits. However, we believe the circumstances, without ruling by the ALJ, left the respondent uncertain what its obligation

might be. We therefore include in the remand directions that respondent be afforded reasonable time to set an examination at the prison.

Upon remand, the ALJ should determine an appropriate deadline for additional evidence by the parties. If respondent either does not or cannot obtain evaluation within that deadline or if claimant presents no evidence of average weekly wage, the ALJ should be free to decide the case on the record before him. The Award of October 27, 1999, is hereby set aside and the case remanded for further proceedings consistent with the above rulings.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler on October 27, 1999, should be, and the same is hereby, remanded.

IT IS SO ORDERED.

Dated this ____ day of April 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steven D. Treaster, Overland Park, KS
Mark E. Kolich, Kansas City, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director